

ILLINOIS POLLUTION CONTROL BOARD

ENVIRONMENTAL RECYCLING AND)
DISPOSAL SERVICES, INC.,)
)
Petitioner,)
)
v.) PCB 16-76
) (Third-Party Pollution Control Facility
WILL COUNTY, ILLINOIS, WILL COUNTY) Siting Appeal)
BOARD, AND WASTE MANAGEMENT OF)
ILLINOIS, INC.,)
)
Respondents.)

NOTICE OF FILING

PLEASE TAKE NOTICE that on the 31st day of August, 2016, Respondent, Will County, Illinois and Will County Board, filed their Response Brief, a copy of which is attached hereto and served upon you.

/s/Charles F. Helsten
Charles F. Helsten
Attorney for Respondent, Will County,
Illinois

PROOF OF SERVICE

Under the penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that this notice of filing and copy of the Opening Brief were served upon the parties referenced on the attached service list via email prior to 5 p.m. on the 31st day of August, 2016.

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RESPONSE BRIEF OF WILL COUNTY AND WILL COUNTY BOARD.

NOW COME Respondents, WILL COUNTY, ILLINOIS, and the WILL COUNTY BOARD, (hereafter, the "County") by and through their attorneys of record, HINSHAW & CULBERTSON LLP, and for their Response Brief in the above-captioned matter state as follows:

The Opening Brief of Petitioner Environmental Recycling and Disposal Services, Inc. ("ERDS") relies heavily on "testimony" by counsel, unsupported by any evidence in the record. The legal standard for review in this matter is clear, however: The PCB is to review the County Board's decision "based *exclusively* on the record before the county board." 415 ILCS 5/40.1(b) (emphasis added). The only exception to this limitation is in cases involving a fundamental fairness claim. *See Fox Moraine LLC v. United City of Yorkville*, 2011 IL App (2d) 100017, ¶ 58. Petitioner voluntarily dismissed its fundamental fairness claim after discovery in this matter; therefore, the PCB's review of the County Board's decision is limited to the record. The extra-record musings by counsel presented in Petitioner's Opening Brief as "evidence" must be disregarded by this Board.

Petitioner also attempts to restate the manifest weight of the evidence standard as something other than the deferential standard of review that it actually is. *See* Pet. Opening Br.

at 2. However, again, the law is clear and well established: An agency's determinations of fact are not to be disturbed unless the opposite conclusion is clearly apparent. *Land & Lakes Co. v. PCB*, 319 Ill. App. 3d 41, 48 (2000). In other words, "[i]f the record contains evidence to support the agency's decision, it should be affirmed." *Abrahamson v. Ill. Dep't of Professional Regulation*, 153 Ill. 2d 76, 88 (1992). This is obviously not a "rubber stamp" review, as implied by Petitioner, but, rather, is a deferential standard.

A. Criterion I

Petitioner attempts to undermine the County Board's findings on Criterion I by relying on counsel's unsupported statements and by relying on the County Staff Report, which does not actually support Petitioner's arguments. For example, Petitioner argues, with no evidence whatsoever, that the amount of contaminated soil requiring disposal will diminish in the future. Petitioner criticizes WMI's expert for making projections "based on past waste generation data without any knowledge as to whether future generation will be greater, equal to or less than past generation." Pet. Opening Br. at 5. It is unclear exactly what mechanism Petitioner would use to obtain this knowledge regarding future generation, however. Absent a crystal ball to tell the future, projections based on past waste generation data are an entirely reasonable way to predict future generation rates.

Ironically, Petitioner complains with respect to disposal capacity that Ms. Smith did not make projections regarding other facilities' capacity to receive special wastes, instead relying on actual historical data about their past receipt of such wastes. Pet. Opening Br. at 7 ("For Ms. Smith to opine that future landfill availability to take special waste [sic] is limited to the percentage of their capacity allocated to special waste in the past is totally unsupported and arbitrary."). Despite Petitioner's apparent disdain for projections based on historical usage and empirical data, these calculations are commonly used in needs analyses under Section 39.2, and both this Board and Illinois courts have affirmed that decisions based on such analyses are not

against the manifest weight of the evidence. *See, e.g., E&E Hauling, Inc. v. PCB*, 116 Ill. App. 3d 586, 604-05 (1983). Simply put, Petitioner cannot have it both ways.

Similarly, Petitioner argues that the County Board should have considered future, but not yet permitted, waste disposal facilities. However, the PCB does not require the inclusion of unpermitted future facilities in a needs analysis. *See, e.g., Am. Bottom Conservancy v. Village of Fairmont City*, PCB 01-159, 2001 WL 1286096, at *20-21 (PCB Oct. 18, 2001); *Waste Management of Ill., Inc. v. Kankakee County*, PCB 04-186, 2008 WL 256799, at *47 (PCB Jan. 24, 2008).

Petitioner also asserts, again without citation to any authority whatsoever, that market driven volume does not equate to need. Pet. Opening Br. at 7. However, market demand is obviously an essential, driving component of need, and courts have found that the "use of 'necessary' in the statute does not require applicants to show that a proposed facility is necessary in absolute terms, but only that the facility is 'expedient' or 'reasonably convenient' vis-à-vis the area's waste needs." *E&E Hauling*, 116 Ill. App. 3d at 605. Market demand is clearly a component in what is "reasonably convenient" in a service area, and tells volumes in the present case.

Petitioner makes much of the County staff's statement that certain waste identified by the applicant may have a wide range of generation and disposal pathways that are difficult to pinpoint. Pet. Opening Br. at 7. The County staff were merely stating the obvious, however, rather than acknowledging some fatal flaw in Ms. Smith's analysis. Further, contrary to Petitioner's claims, the County Board relied on the Recommendations of the Will County Pollution Control Facility Committee, which adopted the Hearing Officer's Findings and Recommendations, rather than the Staff Report in making its determination. Will County Res. 15-380; *see* Pet'r Opening Br. at 8 (asserting that the County Staff Report was relied on by the

County Board, although the County Board clearly relied on the Hearing Officer Recommendations and Finding).

The Hearing Officer noted that there was "no direct contradiction of the amounts of waste generated and needing disposal or the amount of waste capacity for said disposal. Ms. Smith was competent to provide her expert opinion that a need exists for this proposed expansion. She was credible and has a solid understanding of the complexities of the necessary analysis . . . to reach her conclusions." Recommendation and Findings at 3. This finding is startlingly similar to the court's language in *Fairview Area Citizens' Taskforce v. PCB*:

"Had the life expectancies of the local and surrounding landfills been such as to negate a need, petitioners had the opportunity to place such evidence before the village board. While challenging [Applicant's] figures, petitioners *did not present calculations of their own* for the village board's consideration. As a result, it is appropriate for the village board to rely on the information in evidence." 198 Ill. App. 3d 541, 553 (1990) (emphasis added).

In the present proceeding, it was appropriate, reasonable, and not against the manifest weight of the evidence for the County Board to rely on a credible witness who has a solid understanding of the complexities of a needs analysis. The County Board's decision on this criterion should therefore be affirmed.

B. Criterion II

Once again, Petitioner relies solely on "testimony" by its counsel and unsupported factual allegations in support of its claim that the County Board's decision as to Criterion II was against the manifest weight of the evidence. Petitioner first makes claims regarding the present state of the ESL Landfill, with no evidence in the record to support these claims. Pet'r Opening Br. at 8. Petitioner also casts unsubstantiated aspersions on the motivations of the County regarding its receipt of host fees. *Id.* at 8-9. Finally, Petitioner implies, again with no evidentiary support, that the facility has caused groundwater exceedances in the area of the Silurian Dolomite Aquifer. *Id.* at 9. These extraneous statements should be entirely disregarded.

The only *actual* evidence presented at the hearing before the County Board was credible testimony by three separate experts, each with decades of experience, that the facility is so designed, located, and proposed to be operated so that the public health, safety, and welfare will be protected. The County Board reasonably relied on this testimony and evidence to determine that Criterion II had been met. This decision was not against the manifest weight of the evidence and should be affirmed by this Honorable Board.

C. Criterion VI

As with its challenge to the previous criteria, Petitioner's challenge to Criterion VI is vague and riddled with assumptions unsupported by evidence. Petitioner's claim that the application and testimony did not describe existing traffic flows is patently contradicted by the testimony in the record. *See* 10/19/15 Tr. at 177-96. Petitioner makes completely unsupported assumptions regarding the Applicant's motive for this alleged omission. Petitioner also makes claims regarding the current state of traffic that are unsupported by evidence in the record.

Further, Petitioner conveniently neglects to mention that there is *unrebutted* evidence in the record that the amount of traffic going to the expansion facility will be no greater than the amount currently going to the facility. *Id.* at 185-86. Petitioner also fails to mention that, notwithstanding the same volume of anticipated traffic as currently exists, the Applicant has proposed improvements to the facility entrance and stacking capacity to improve the flow of traffic. *Id.* at 193. Petitioner claims that the Ms. Means was incompetent, but Petitioner's opinion regarding her competence is completely irrelevant. It was up to the County Board alone to gauge Ms. Means' competence, which it did. The County Board found Ms. Means' unrebutted evidence to be credible.

Based on this evidence alone, it was clearly not against the manifest weight of the evidence for the County Board to determine that Criterion VI had been met and that the traffic flows to and from the facility were designed so as to minimize the impact on existing flows. In

fact, it would have been reasonable for the County Board to conclude that traffic flows may be *improved* by the proposed changes associated with the expansion, although that is not what is required under the Criterion. Instead, "[t]he operative word in the statute seems to be 'minimize.' It is impossible to eliminate all problems." *Tate v. PCB*, 188 Ill. App. 3d 994, 1024 (1989).

Petitioner also argues, without legal support, that the Applicant should have been required to show that traffic would be minimized during the entire life of the project. That is simply not required by the statute or the cases interpreting this Criterion. In this case, as in *File v. D&L Landfill, Inc.*, "existing traffic flows will be impacted only slightly [if at all,] as all trucks entering or leaving the landfill will be using the existing entrance. Any impact on existing traffic flows will result only from any increase in traffic, which, according to the evidence," will be nonexistent or minimal. 219 Ill. App. 3d 897, 908 (1991).

Finally, Petitioner argues that the Hearing Officer made reversible error by not allowing it to cross examine Ms. Means regarding traffic subsequent to 2018. As noted above, the Applicant is not required to provide evidence regarding traffic flows throughout the life of the facility but simply that the impact to *existing* flows will be minimized. Further, Petitioner did not properly preserve this error by making a relevant offer of proof. 10/19/15 Tr. at 198-99.

The County Board's finding that Criterion VI had been met was not against the manifest weight of the evidence. Not only did the Applicant provide evidence that the impact to traffic flows would be minimized, but it actually provided evidence that traffic flows would be improved by certain improvements associated with the new facility. In light of the un rebutted evidence in the record, the County Board's decision should be upheld.

D. Conclusion

Petitioner has provided no further insight into the allegations of Paragraph 6 of its Amended Petition, related in some way to the County Board's "conditional" approval of the

Application. Because Petitioner did not raise this issue in briefing, it has waived this claim. Paragraph 6 of the Amended Petition should therefore be disregarded and stricken.

Based on the foregoing, the County Board's decision granting WMI's Application for siting approval was not against the manifest weight of the evidence. The County Board's decision should therefore be affirmed.

WHEREFORE, WILL COUNTY and the WILL COUNTY BOARD respectfully request that this Honorable Board uphold the County Board's grant of siting approval.

Respectfully submitted,

WILL COUNTY, ILLINOIS and WILL
COUNTY BOARD

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